**U.S. Department of Labor**

**Office of Administrative Law Judges**
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**Issue date: 04Oct2002**

**CASE NO.: 2002-STA-00022**

**IN THE MATTER OF**

**WILL R. HARDY,**
**Complainant**

**v.**

**MAIL CONTRACTORS OF AMERICA,**
**Respondent**

**APPEARANCES:**

**PAUL O. TAYLOR, ESQ.**
**On behalf of the Complainant**

**OSCAR E. DAVIS, JR., ESQ.**
**KHAYYAM M. EDDINGS, ESQ.**
**On behalf of the Respondent**

**Before: LARRY W. PRICE**
**Administrative Law Judge**

# RECOMMENDED DECISION AND ORDER

**(Granting Summary Judgment and Denying Complaint)**

This case arises under the "whistleblower" protection of Section 405 of the Surface Transportation Assistance Act of 1982 (hereinafter STAA), 49 U.S.C. § 31105 (2000), and the regulations at 29 C.F.R. Part 1978. On August 8, 2002, a Motion for Summary Judgment was filed on behalf of Mail Contractors of America (Respondent). Complainant responded with a brief and exhibits on August 20, 2002. Because the undisputed facts demonstrate that Complainant did not engage in a protected activity and there is no genuine issue as to material fact, summary judgment is appropriate in this case.[1]

## FACTS

[1] The following abbreviations shall be used when citing materials: Respondent's Brief–RB; Complainant's Brief–CB; Respondent's Reply–RR; Deposition–Dep.; Complainant's Exhibit–CX.

Complainant was employed as a truck driver for Respondent until he was fired as a result of the events which form the core of the present dispute. He was hired by Respondent on September 27, 1997, in Jacksonville, Florida, and was transferred to the Atlanta terminal in March 1998. (RB p. 1; CB p. 1). On February 25, 2001, Complainant was assigned to Respondent's Clinton, Tennessee, run, which required him to deliver mail to and from Respondent's terminal in Atlanta, Georgia, to Clinton, Tennessee. (RB pp. 1-2; CB p. 1).

While on his way to Clinton, Complainant stopped to call Theda Barker, a dispatcher, and told her that his tractor had lost power and would only go thirty-five miles per hour. (RB p. 2; CB p. 2). Barker told Complainant to call back in a few minutes so that she could inform the maintenance department. (RB p. 2; CB p. 2). When Complainant called back, Barker told him that she had notified Kevin Wright, a manager in Atlanta, about the problem and instructed him to continue driving to Clinton. (RB p. 2; CB p. 2).

Complainant continued driving and stopped again in Ringgold, Georgia. (RB p. 2). He called Barker and was transferred to an on-duty mechanic back in Atlanta. (RB p. 2; CB p. 2). Barker and the mechanic told Complainant that once he reached Clinton, they would make arrangements to repair his tractor, and in the meantime, he should continue to drive. (RB p. 2; CB p. 2). Complainant believed that the tractor was a safety hazard on the highway and told Barker and the mechanic that he would not drive back to Atlanta unless the tractor was repaired. (RB p. 2; CB p. 2).

After Complainant reached Clinton, he called the dispatcher and spoke with Mike Murphy, the driver supervisor, about arrangements to repair the tractor. (RB p. 2). Complainant told Murphy that the tractor had no power and would present a safety hazard if driven on the highway in that condition. (RB p. 2; CB p. 2). When Murphy told Complainant that there was no one in the area who could repair the tractor, Complainant again refused to drive the tractor unless it was repaired, citing the fact that it was now daytime and the highway traffic had increased. (RB pp. 2-3; CB p. 3).

At that point, Murphy presented Complainant with two options. (RB p. 3; CB p. 3). He could either drive the tractor back to Atlanta since the bad speed sensor was neither deemed an unsafe condition nor a Department of Transportation out-of-service condition or go off duty until a wrecker arrived from Atlanta with a replacement tractor. (RB p. 3; CB p. 3). Upon hearing his options, Complainant replied, "I'm not driving that damn truck back and I'm not going off duty." (RB p. 3; CB p. 3). Murphy explained to Complainant that in the circumstances he was supposed to log off duty and he was being insubordinate in refusing to do so. (RB p. 3; CB p. 3). Murphy told Complainant that if he incorrectly logged off duty time as on duty time, he would not have enough hours of service to return to Atlanta. (RB p. 3; CB p. 3). Complainant again refused to log off duty and hung up on Murphy. (RB p. 3; CB p. 3). Complainant understood that his refusal to log off duty was disobedience of a direct order and resulted in insubordination. (RB p. 3; CB p. 3). Murphy then arranged for a wrecker service to take a replacement trailer to Clinton. (RB p. 3; CB p. 3). The wrecker left Atlanta at 11:00 a.m. (CB p. 3).

Complainant was aware that it took about four hours to travel between Atlanta and Clinton and it would take at least that long for the wrecker to arrive in Clinton from Atlanta once it was dispatched. (RB p. 3). While Complainant was waiting for the wrecker to arrive, he was able to use the Clinton postal facility's break room, which had a television, vending machines, a microwave and restrooms, although there was no place to sleep. (RB p. 3; CB pp. 3-4). In addition, there were several restaurants located close to the postal facility, some of which were within walking distance. (RB pp. 3-4; CB p. 4). Complainant also had the use of a company cellular telephone with which he could communicate with Respondent, although he did not do so. (RR p. 7; CB pp. 4-5).

Despite Murphy's orders, Complainant recorded this time as on duty, claiming that he had to remain with his truck and was unable to pursue other activities. (RB p. 4; CB p. 4). However, Murphy had specifically told Complainant during their earlier conversation that he was not responsible for the tractor or trailer while off duty, in accord with Respondent's written policy. (RB p. 4; CB p. 4). Complainant had responded that federal regulations required him to record the time spent waiting for the replacement truck as on duty. (CB p. 4).

The replacement truck arrived in Clinton at about 3:00 p.m. that afternoon. (CB p. 5). Complainant then called Phyllis Peavy, one of Respondent's employees, and told her that he would not be able to return to Atlanta without violating the federal regulation against driving after having been on duty for fifteen hours without taking an eight hour break. (CB p. 5). Complainant had about two hours of driving time left, so Peavy instructed him to drive to Chattanooga, Tennessee, where someone would meet him to take over driving his truck. (CB p. 5). Complainant was also told that he would probably have to spend the night in a hotel. (CB p. 5).

When Complainant reached Chattanooga, he called Peavy again and was instructed to go to a nearby hotel, where Respondent would make arrangements to pay for his room. (CB p. 5). The desk clerk would not accept Respondent's credit card number over the phone, so Complainant was told that he should wait for another driver to come and relieve him. (CB p. 6). Complainant waited for about two hours until a replacement driver arrived. (CB p. 6). He recorded this as on duty (not driving) time and was subsequently paid for his time by Respondent. (CB p. 6).

Complainant was issued a Final Warning in Lieu of Suspension notice on February 27, 2001, as a result of his conduct in Clinton. (RB p. 4; CB p. 6). In the warning, Complainant was explicitly told that he was not responsible for the tractor or trailer while off duty. (RB p. 4; CB p. 6). He was also told that the Final Warning had the same weight as a suspension and was the last step before termination in Respondent's progressive discipline system. (RB p. 4; CB p. 6).

About a month after this incident, on March 21, 2001, Complainant, along with ten or more other drivers, was notified that he was incorrectly logging on duty breaks during off duty break periods. (RB p. 4; CB p. 6). Complainant was told that his failure to log off duty breaks correctly had caused him to exceed company guidelines for his bid runs. (RB p. 4; CB pp. 6-7). Respondent did not consider this notification to be a disciplinary action, but Complainant was told that he would face a potential disciplinary action if he continued to violate the guidelines in this manner. (RB p. 4;

CB p. 7). Of all the workers who received this notice, Complainant was the only worker who subsequently failed to remediate his actions. (RB p. 4; CB p. 7).

On March 26-27, 2001, Complainant performed a previously awarded bid run to Birmingham, Alabama. (RB pp. 4-5; CB p. 7). The activity report for the March 27 bid run indicates that the trailer that Complainant drove to Birmingham was empty, but Complainant does not recall whether it was empty or not. (RB p. 5; CB p. 7). Complainant was scheduled to take an off duty break from 12:45 a.m. (EST) until 2:15 a.m. (EST), but he never took the break and instead remained on duty during that time. (RB p. 5; Bickel Dep. 24-25). Although Complainant does not remember what he did during that time, he agreed that the activity report said the trailer was empty. (RB p. 5; CB p. 8). If that was actually the case, Complainant would not have spent any time unloading the trailer or guarding its contents. (RB p. 5; CB p. 8).

Sometimes the drivers are required to assist with loading and unloading the trucks. (RB p. 5; CB p. 8). If an expediter needs assistance with this task and the driver is unable to take his off duty break at the scheduled time, the driver must request a late slip from the expediter to document the time. (RB p. 5; CB p. 8). Respondent is then reimbursed by the postal service. (RB p. 5; CB p. 8). In this case, there was no late slip. (RB p. 5; CB p. 8). While drivers also make these sorts of notations on their recording logs, no such notations appeared in Complainant's log indicating that he had helped to unload the truck in Birmingham. (RB p. 5; CB p. 8).

On the return trip to Atlanta, Complainant stopped and took a break in Villa Rica, Georgia, for over an hour. (RB p. 5-6; CB p. 9). Complainant remained on duty during this time despite a) having received prior counseling regarding taking on duty breaks, b) having received a final warning in lieu of suspension for the incident in Clinton and c) having at least constructive knowledge that the company handbook stated that drivers are relieved of duty by Respondent while on break. (RB p. 6; CB pp. 9-10).

When asked about why he did not take an off duty break during the Birmingham bid run, Complainant replied that he would not take any further off duty breaks because he believed himself responsible for the tractor, trailer and its contents. (RB p. 6; CB p. 10). However, Complainant was unable to recall whether the tractor was loaded or what work functions he had done that justified remaining on duty. (RB p. 6). Complainant was reminded that the equipment and its contents were not his responsibility while off duty and he should have taken the break provided in the bid schedule. (RB p. 6; CB p. 10).

The time guideline for the Birmingham run was seven hours and forty-five minutes. (RB p. 6; CB p. 10). Because Complainant logged two hours and fifty-seven minutes of mostly off duty time as on duty, he exceeded the guideline by two hours and ten minutes. (RB p. 6; CB p. 10). On March 30, 2001, Complainant was notified by letter that his employment with Respondent was terminated by insubordinate behavior, specifically for remaining on duty during scheduled off duty breaks on February 27, 2001, and March 26-27, 2001. (RB p. 6; CB p. 11; CX. 9).

On or about April 9, 2001, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him in violation of Department of Transportation regulations and the STAA. (RB pp. 7-8; CB p. 11).

# LAW AND CONTENTIONS

Both Parties have filed cross-motions for summary judgment in this case. 29 C.F.R. § 18.40(d) provides in pertinent part: "The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

In deciding a motion for summary decision, the court must consider all the materials submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is made. See LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993); United States v. TRW, Inc. 4 F.3d 417, 423 (6th Cir. 1993), cert. denied 511 U.S. 1004 (1994).

In this case, both Parties have given substantially the same account of the factual circumstances surrounding Complainant's termination, and neither Party has presented a genuine issue as to material fact. Accordingly, I find that summary judgment is appropriate in this situation. I must now analyze the legal issues presented in order to determine whether to grant summary judgment in favor of Complainant or in favor of Respondent.

The Secretary has stated that the STAA should be interpreted liberally in order to promote an interpretation of the Act which is consistent with its congressional intent, namely the promotion of commercial motor vehicle safety on the nation's highways. See generally Boone v. Trans Fleet Enter., Inc., 1990-STA-7 (Sec'y July 17, 1991), aff'd sub nom. Trans Fleet Enter., Inc. v. Boone, 987 F.2d 1000 (4th Cir. 1992); Somerson v. Yellow Freight Systems, Inc., 1998-STA-9 and -11 (ARB Feb. 18, 1999). This statute provides protection for employees of commercial motor carriers in the event that they are asked to violate federal law in order to comply with company rules or orders. Respondent operates an interstate trucking business in which it contracts with the United States Postal Service to deliver bulk mail to postal facilities. Respondent has not asserted that it is not a commercial motor carrier or that the tractor-trailers operated by Complainant were not commercial motor vehicles within the meaning of the STAA and its regulations. Accordingly, I find that Respondent is a commercial motor carrier and that the tractor-trailers operated by Complainant are commercial motor vehicles. The STAA is the applicable law in this case.

The STAA states in pertinent part: "A person may not discharge an employee . . . because . . . the employee refuses to operate a vehicle because . . . the operation violates a regulation, standard or order of the United States related to commercial vehicle safety or health." 49 U.S.C. § 31105(a)(1)(B)(i) (2000). Refusing to drive when the contemplated run would cause the driver to

violate the federal hours of service regulation is protected activity under the STAA. Assistant Sec'y & Brown v. Besco Steel Supply, 1993-STA-30 (Sec'y Jan. 24, 1995). In essence, the STAA prevents an employer from discharging an employee for refusing to operate a vehicle in violation of a federal regulation, including the hours of service regulations at 49 C.F.R. § 395 (2001). See Hamilton v. Sharp Air Freight Serv., Inc., 1991-STA-49 (Sec'y July 24, 1992), slip op. at 1-2; Greathouse v. Greyhound Lines, Inc., 1992-STA-18 (Sec'y Aug. 31, 1992).

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. Byrd v. Consolidated Motor Freight, 1990-STA-9 (ARB May 5, 1998) (citing Shannon v. Consolidated Freightways, 1996-STA-15 (ARB Apr. 15, 1998), slip op. at 5-6). A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action and (4) the existence of a "causal link or nexus," *e.g.*, that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Byrd, 1990-STA-9 (citing Shannon, slip op. at 6; Kahn v. United States Sec'y of Labor, 64 F.3d 261, 277 (7th Cir. 1995)). A respondent may rebut this prima facie showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity *was* the reason for the action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-508 (1993).

The Parties do not dispute that Complainant was terminated, which is an adverse employment action, and that the reason for the termination was that Complainant remained on duty during what Respondent alleges were off duty break periods on February 25, 2001, and March 26-27, 2001. The focus of the dispute is whether Complainant's refusal to take his off duty breaks was a protected activity under the STAA and relevant case law. Complainant argues that he was following federal regulations when he refused to record his breaks as off duty and that he would have been falsifying records if he had recorded off duty breaks according to Respondent's instructions. Respondent, on the other hand, argues that it did not ask Complainant to falsify his records and that Complainant was instead terminated for insubordination.

In order to determine whether or not Complainant was following federal regulations by remaining on duty during the times in question, it is necessary to examine the relevant statutory definition of on duty time. 49 C.F.R. § 395.2 defines on duty time as:

> All time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. *On duty time* shall include:
>
> (1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper . . . waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier.
>
> 49 C.F.R. § 395.2 (2001).

Each of the bid runs in question will be examined in turn in order to determine whether or not Complainant was correct in remaining on duty against Respondent's orders.

**Clinton, Tennessee, Bid Run: February 25, 2001**

When Complainant was in Clinton, Tennessee, on the day in question, he was specifically told by his driving supervisor that he was relieved from duty and was not responsible for the truck, trailer or its contents until a replacement truck arrived from Atlanta later that day. Complainant argues that he remained on duty in accord with the federal regulation cited above. In another case in which the meaning of "on duty" was disputed as between the complainant and the respondent, the complainant, a bus driver, was ultimately found to have correctly logged his time as on duty when he was "required to remain with the bus, or in the vicinity; to attend to the needs of the group he was transporting, to maintain or fuel the bus, or to attend to breakdowns . . . . Even . . . when [Complainant] returned to base he was standing by to pick up a group in a few hours and that is, properly, considered on duty time." Polger v. Florida Stage Lines, 1994-STA-46 (Sec'y Apr. 18, 1995). This case illustrates the types of things which will allow a break to qualify as on duty time, even if the employer has mistakenly told the driver that he must go off duty.

While Polger contemplates a situation in which a driver can rightly remain on duty in the event of a breakdown, Polger can be distinguished from the situation in this case in order to show that Complainant wrongly remained on duty when he refused to log off duty as per Respondent's orders. Respondent's Company Handbook states that drivers might be requested to log off duty in the event of an unforeseen occurrence such as a breakdown. (CX. 3). Respondent's policy is that once an employee goes off duty, he or she is not responsible for the tractor or trailer during the off duty period. (CX. 3). On the day in question, Complainant was specifically told that he was relieved from duty until a replacement truck arrived from Atlanta. He was not required to remain with his truck; he was free to walk to nearby restaurants or spend time in the postal facility break room. He was not asked to assist in the repair of the truck. Complainant reasons that since he did not know exactly what time the replacement truck would arrive, he was not free to use the time as he chose and therefore he should have remained on duty. In fact, however, Complainant *did* know that the truck was coming from Atlanta and that Atlanta was about a four hour drive from Clinton. He knew that it would take at least four hours for the replacement truck to reach Clinton from Atlanta, and he was free to spend his off duty time in any way that he chose until that time.

Given the undisputed facts of this situation, the federal regulations and applicable case law do not justify Complainant's refusal to follow Respondent's orders to take an off duty break on February 25, 2001. Therefore, I find that Complainant was not engaging in STAA protected activity on February 25, 2001.

**Birmingham, Alabama, Bid Run: March 26-27, 2001**

While Complainant argues that the STAA protects him for his refusal to take an unscheduled off duty break on February 25, 2001, he also argues that the STAA protects him for his refusal to

take his scheduled off duty break on March 26-27, 2001. With regard to this second bid run, Complainant again argues that he did not go off duty as scheduled because he felt responsible for his truck and its contents. After the February 25 bid run, Complainant was issued a Final Warning for his conduct and was subsequently reminded that he was required to take off duty breaks at certain times, and yet he refused to comply with Respondent's rules. Just as with the February 25 run, the issue is whether or not Complainant was justified in remaining on duty during his March 26-27 bid run and is therefore entitled to the protections of the STAA.

The Federal Highway Administration has issued helpful guidelines for interpreting the STAA regulations. For example, if a commercial motor vehicle driver is to record meal and other routine stops made during a tour of duty as off duty time, the following conditions must be met:

> 1. The driver must have been relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying.
> 2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a CMV [commercial motor vehicle] will be significantly reduced.
> 3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer.
> 4. During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.
> 62 Fed. Reg. 16,422 (1997) (to be codified at 49 C.F.R. pt. 3).

Further, the guidelines provide that "[i]t is the employer's choice whether the driver shall record stops made during a tour of duty as off duty time." Id. In other words, it is not up to the driver to decide whether or not to record a break as off duty time. Respondent's policy, for example, is that all breaks over twenty minutes should be recorded as off duty. (CX. 3).

Each of the foregoing guidelines for an off duty break are fulfilled in the case here. Complainant knew that he was supposed to take an off duty break from 12:45 a.m. to 2:15 a.m. because this time was marked as off duty in his bid schedule. (CX. 2). The break was of a finite period of time–an hour and a half–and was made known to Complainant in written instructions, again on the bid schedule. (CX. 2). Complainant had already signed the company handbook and been told by his supervisors that he was not responsible for the truck during off duty times and that he was required to go off duty when instructed. Complainant was free to leave the premises and spend the break time somewhere else if he wished to do so, and he knew that he was allowed to use the truck to go places while he was off duty.

Despite the fact that the off duty break on March 26-27 fulfilled all the above requirements, Complainant refused to go off duty during this time period. However, he could furnish no satisfactory explanation for why he did so. He could give no justification for why he remained on duty during the scheduled off duty break, other than his personal feeling of responsibility for the truck and its contents. Complainant could not even remember whether he had been carrying anything in his trailer or whether he assisted in unloading once he reached Birmingham. While it is true that Complainant would have engaged in protected activity had he remained on duty in order to attend to the truck, its contents or unloading, even if Respondent had told him not to, or even if he would have exceeded the scheduled time for the run in doing so, Complainant has presented no evidence that he was doing any of these things when he took his break.

Just as Complainant's refusal to take an off duty break on February 25, 2001, cannot be justified under the applicable federal regulations and case law,[2] Complainant's refusal to take an off duty break during his March 26-27 bid run is also not a protected activity under the STAA. Accordingly, I find that the Complainant has failed to establish a prima facie case under the STAA and recommend that the Secretary enter the following order pursuant to 29 C.F.R. § 1978.109(c)(4) (2001):

[2] I wish to note here a response to Complainant's argument that, viewed under the rubric of 62 Fed. Reg. 16,422, he was engaged in protected activity when he refused to go off duty on February 25, 2001, because the break in question was neither scheduled nor set for a "finite" period of time. Complainant's reliance on this line of argument is misplaced. These guidelines are inapplicable in this situation, as they are specifically intended to clarify "meal and other routine stops." The stop here, an unanticipated breakdown, is an unforeseen, and therefore unscheduled, occurrence which cannot be accounted for ahead of time. The federal guidelines cited by Complainant do not apply to the February 25 bid run break.

# ORDER

The complaint of Will R. Hardy is **DENIED**.

**SO ORDERED.**

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**LARRY W. PRICE**
**Administrative Law Judge**

**LWP:bab**

**NOTICE**: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996).